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No. 81-2121

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

EDWARD J. BOLL, JR.

Petitioner,

vs.

STATE OF OHIO

Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF HAMILTON COUNTY, OHIO

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED

1. Can an issuing magistrate rely upon the inherent credibility of an unnamed eyewitness citizen, not an informant, in issuing a search warrant, where the affidavit contains non-hearsay facts which support the credibility of such information?

2. Can law enforcement officers, legitimately on property under authority of a search warrant, seize items of contraband which come into plain view which are not specifically listed in the warrant?

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OPINIONS BELOW

The petitioners brief accurately sets forth the opinion of the Ohio First District Court of Appeals and the entry of the Ohio Supreme Court denying jurisdiction.

JURISDICTION

Petitioners jurisdictional claim is properly stated in his brief.

CONSTITUTIONAL PROVISIONS INVOLVED

FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Ohio Crim. Rule 41, Search and Seizure, Section (C)

(C) Issuance and contents. A warrant shall issue under this rule only on an affidavit or affidavits sworn to before a judge of a court of record and establishing the grounds for issuing the warrant. The affidavit shall name or describe the person to be searched, name or describe the property to be searched for and seized, state substantially the offense in relation thereto, and state the factual basis for the affiant's belief that such property is there located. If the judge is satisfied that probable cause for the search exists, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay in whole or in part, provided there is substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished. Before ruling on a request for a warrant, the judge may require the affiant to appear personally, and may examine under oath the affiant and any witnesses he may produce. Such testimony shall be admissible at a hearing on a motion to suppress if taken down by a court reporter or recording equipment, transcribed and made part of the affidavit. The warrant shall be directed to a law enforcement officer. It shall command the officer to search, within three days, the

person or place named for the property specified. The warrant shall be served in the daytime, unless the issuing court, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. The warrant shall designate a judge to whom it shall be returned.

STATEMENT OF THE CASE

a.) Procedural Posture

Petitioner was indicted by the Hamilton County, Ohio, grand jury on November 3, 1980, charged with four counts of Receiving Stolen Property and one count of Possession of Criminal Tools. Petitioners motion to suppress was overruled on December 23, 1980, and on January 8, 1981, petitioner entered a plea of no-contest and was found guilty on all counts. Sentences were imposed and made to run concurrently. On December 16, 1981, the Hamilton County Court of Appeals affirmed the conviction, and on March 17, 1982, the Ohio Supreme Court declined to take jurisdiction. This petition for Writ of Certiorari then followed.

b.) Facts

On October 10th, 1980 Deputy William McGaha of the Hamilton County Sheriff's Patrol obtained a search warrant for the premises and property at 8709 Bridgetown Road. The affidavit in support of this warrant state as follows:

> "William McGaha, Hamilton County Sheriff's Patrol being first duly cautioned and sworn, deposes and says that within the jurisdiction of the Hamilton County Municipal Court at: 8709 Bridgetown Road.,

> Hamilton County, Ohio he believes and has good cause to believe that at said place there is concealed a case 480 back hoe loader const. king, yellow in color, or parts thereof and that said items are concealed in violation of law, to wit: 2913.51 R.C. Receiving Stolen Property, value over $150.00 such belief is supported by the following facts: Information given to me by Edward Bedel, owner operator of the Bridgetown Tool Rental. That located at the above address is located the back hoe, or parts thereof. This information was given to him by a subject that saw these items on Tuesday, 10-7-80. The informant described the back hoe assembly to Mr. Beder as follows: The part was yellow and had had stickers removed that are the exact size used by the Tool Rental, also the serial numbers have been ground off. He also described the size (480) of which there are only 7 of this size in Cincinnati and Mr. Bedel owns 4 or these. It is known by me that this subject has been convicted of receiving stolen property (autos and trucks) in the past and is now on probation. Mr. Bedel has personally appeared before the issuing Judge and has sworn to these facts. (Sworn & questioned by me. Rosen J. 10/10/80)
>
> On 5-20-79 Mr. Bedel made a theft report to Green Twp. Police reference the case back hoe loadex serial #8956809 Eng. 281-7457."

This affidavit was sworn to before Judge Jack Rosen of the Hamilton County Municipal Court. After the phrase:

> "Mr. Bedel has personally appeared before the issuing judge and has sworn to these facts",

which appears in the body of the affidavit, is a handwritten and dated notation as follows:

> " (Sworn & questioned by me. Rosen J. 10/10/80) "

On the strength of this affidavit a search warrant was issued.

At approximately noon on October 10th, 1980 Officer McGaha and three other officers arrived at the premises at 8709 Bridgetown Road. These premises consisted of a house with a garage underneath, several large outbuildings, and approximately 11 acres of land. The land was in a rough state, overgrown with weeds, and was not cultivated. The officers went to the house and gave a copy of the warrant to the petitioner's wife. The petitioner himself was not present at this time.

Accompanied by the petitioners wife the officers first went to the garage, then to the various outbuildings, and then searched through the fields. As this search progressed it developed that there were approximately 20 cars on the property. Some of the cars were in the process of being stripped. Fenders and hoods, etc., had been cut off, tires were gone. There were numeorus tools on the premises used for stripping and cutting cars. Officer McGaha had been an investigator with the auto theft squad for 5 years. Based on this experience he realized that a "chop-shop" was being run on the search premises; that is, an operation where stolen cars are modified or cut down and sold for parts. Based on this conclusion Officer McGaha, as he searched for the backhoe and its parts, noted the V.I.N. numbers on the various vehicles, and called them into headquarters. Word came back over his police radio that four of the vehicles were stolen, one as recently as the previous night.

The four stolen cars were as follows: (1) volkswagen, found in the garage, on blocks and partially stripped, (2) a 1980 Oldsmobile and (3) a pickup truck both found in an outbuilding. The Olds was missing the front fenders and hood, and the seat had been removed. (4) A Datsun

parked behind a building in some woods (R 49). These cars and the stripping equipment were removed. The backhoe and its parts were never found.

REASONS FOR DENYING WRIT

1. SEARCH WARRANTS MAY BE BASED WHOLLY OR IN PART UPON HEARSAY, PROVIDED THERE IS SUFFICIENT INFORMATION PRESENT TO SHOW PROBABLE CAUSE THAT THE PROPERTY DESCRIBED IS AT THE NAMED LOCATION, AND TO SHOW THE RELIABILITY OF THE SOURCE OF THE HEARSAY.

Petitioner contends that the affidavit for search warrant was insufficient. The basis for this position is that the affidavit fails to show that the informant is credible and reliable. Petitioner cites to *Aguilar* v. *Texas*, 378 U.S. 108 (1964) and *Spinelli* v. *United States*, 393 U.S. 410 (1969) as support for his contention. It is the position of the respondent that those cases have no application here, and that the affidavit is sufficient.

First of all an understanding of just what is in the affidavit is necessary. The affidavit must be read in a common sense fashion, realizing that it was drafted by laymen, not by attorneys. *United States* v. *Ventresca*, 380 U.S. 102 (1965). Read in this fashion the affidavit shows as follows:

1.) A Mr. Bedel operates Bridgetown Tool Rental

2.) In this capacity he owns 4 of the 7 Case backhoes which are in this metropolitan area.

3.) One of Mr. Bedel's backhoes was stolen some time previously.

4.) An unamed subject actually saw the backhoe, partially disassembled, on the premises at 8709 Bridgetown Rd. on 10-7-80.

5.) This unnamed subject was able to give such a particularized description of the backhoe to Mr. Bedel that Bedel could recognize it as his missing backhoe.

6.) The unnamed subject reported that the identifying serial number had been ground off the backhoe.

7.) Officer McGaha has knowledge that Edward Boll, the owner of the premises, has convictions for receiving stolen vehicles.

8.) Mr. Bedel personally appeared before Judge Rosen and was questioned by him.

Bedel's credibility is not at issue since he appeared before the judge, who could thus apply the usual courtroom criteria in determining credibility. The affidavit describes the unnamed person once as a "subject" and once as an "informant" . However it is clear that this person only talked to Mr. Bedel, and *not* to Officer McGaha. Thus this unnamed person is not a paid informant or a police informant. The unnamed person is merely a disinterested party who reported what he actually saw to Mr. Bedel. He is an eyewitness observer of the fact of the backhoes presence. The affidavit is based partly on hearsay – from the unnamed person – and partly on direct evidence from Bedel and McGaha who both appeared before the judge issuing the warrant.

Ohio Criminal Rule 41, *Search and Seizure,* states in pertinent part as follows:

> "(C) Issuance and Contents
> . . . The finding of probable cause may be based on hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished."

The present affidavit satisfies this requirement. First of all, first-hand observations are a commonly accepted method of showing a 'factual basis'. *State* v. *Karr,* 44 O.S. 2d 163 (1975). As to credibility there are several things to consider. First of all the ability of the unnamed citizen to describe the missing backhoe proves that he must have seen it. The machines were very uncommon and this one had a distinctive marking where Mr. Bedel's stickers had been removed. This alone is sufficient to show credibility. *Draper* v. *United States,* 358 U.S. 307 (1959) Secondly, the unnamed person was *not* a police informant; he was a citizen witness to the concealed property who reported it. This type of person is entitled to be given credibility. *Jaben* v. *United States,* 381 U.S. 214 (1965). Finally, the strict credibility requirements of *Aguilar* v. *Texas,* supra and *Spinelli* v. *United States,* supra, which defendant specifically relies on, do not apply in this case. The credibility provisions of those cases most stringently apply to situations involving regular police informants, or paid informants. They do not apply here because sources such as that in this case are inherently more trustworthy than paid informants or regular police informants. *United States* v. *Melvin,* 596 F.2d 492 (C/A 1, 1979), *United States* v. *Burke,* 517 F.2d 377 (C/A 5, 1975), *United State* v. *Bell,* 457 F.2d 1231 (C/A 5, 1972). The *Melvin*

decision, cited above, relied on an "unknown male" as a source and upheld police action. It is submitted that petitioners claims of error are without merit. The citizen informers reliability here is bolstered by his ability to describe a very rare item, which he could not do unless he had actually seen it.

2. OFFICERS WHO ARE IN A PLACE THEY HAVE A RIGHT TO BE AND WHO OBSERVE CONTRABAND OR EVIDENCE OF A CRIME MAY SEIZE THE CONTRABAND OR EVIDENCE WITHOUT OBTAINING A SEARCH WARRANT.

Petitioner contends that the police improperly seized the stolen cars because they were not listed in the warrant and because the plain view doctrine does not apply. It is the position of the state that the seizures were proper under the plain view doctrine. *Harris* v. *United States,* 390 U.S. 234, (1968); *Colorado* v. *Bannister,* 449 U.S. 1 (1980). That doctrine was authoritatively defined by the Ohio Supreme Court in *State* v. *Williams,* 55 O.S. 2d 82 (1978) as follows:

> "In order for evidence to be seized under the plain view exception to the search warrant requirement it must be shown that (1) the initial intrusion which afforded the authorities the plain view was lawful; (2) the discovery of the evidence was inadvertent; and (3) the incriminating nature of the evidence was immediately apparent."

These criteria were satisfied in the present case. First of all the police were properly on the premises pursuant to the search warrant. Secondly, the discovery of the evidence

was inadvertent. The police came across the cars as they were looking for the backhoe. Thirdly, the incriminating nature of the "chop-shop" operation was readily apparent to Officer McGaha, particularly since he was aware of the petitioners prior record. Of course *nothing was seized* until the V.I.N. numbers were confirmed as those of stolen vehicles.

Defendant cites to *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971) for the proposition that police, on the premises with a search warrant, can't seize items not listed which they knew in advance were there. This is undoubtedly true, however it has no application here. The officers had no idea the stolen cars were there, and there is not an iota of evidence to show they did. Petitioners claims in his brief that the officers used the search warrant as a subterfuge to enter his property are totally unsubstantiated. There is not one shred of evidence to support such a statement, and petitioner never attempted at any point to challenge the veracity of the information in the warrant. *Franks* v. *Delaware*, 438 U.S. 154 (1978).

Petitioners reliance upon *United States* v. *Gray*, 484 F. 2d 352 (C/A 6, 1973) is misplaced. Even if *Gray* was correctly decided, it is not in point factually. In *Gray* officers copied down serial numbers of items which were in no way indicative of being contraband. In the present case it was at once apparent that an illegal 'chop-shop' was being operated on the premises. In fact, subsequent to *Gray*, the Sixth Circuit released its decision in *United States* v. *Chapman*, 549 F. 2d 1075 (C/A 6, 1977) in which they state that obvious contraband may be seized when officers are on the premises with a search warrant and come across such items. Petitioners claim here is without merit.

CONCLUSION

Respondent submits that the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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